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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 678. 66

VAN HUFFEL TUBE CORPORATION,
Appellant,
v.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

THE WEAN ENGINEERING COMPANY, INC.,
Appellant,
v.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

BRIEF IN REPLY TO STATEMENT OPPOSING JURISDICTION AND ON MOTION TO DISMISS OR AFFIRM.

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We are not here contending that the decision of the Ohio Supreme Court is violative of Article I, Section 8 of the Constitution of the United States or of 31 U. S. C. § 742 except insofar as the law construed to deny Appellants on the same state of facts the same relief granted six other corporations in the *Wrenn* cases, 156 O. S. 583, 158 O. S. 15 on that ground would be repugnant to the Fourteenth Amendment; hence, the argument of division II of Appellee's statement opposing jurisdiction is not in point.

Despite the caption of division III of Appellee's statement, the authorities cited therein relate generally to the doctrine of *stare decisis*; as we pointed out in the Jurisdictional Statement (p. 11) no question of *stare decisis* is here

involved. The authorities cited by Appellee like those cited in our Jurisdictional Statement (pp. 12-13) are distinguished—none of them involve opposite decisions based upon the same established facts.

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145 did not involve any question of discrimination by application of different constructions of the same law to different litigants in the same situation but rather the contrary. The state court there had held contra to the position on *stare decisis* maintained by Appellee but not urged by us in the case at bar. The case involved a Montana statute empowering the Board of Railroad Commissioners to fix intrastate freight rates subject to change if found unreasonable on complaint of either shipper or carrier by the Board or by judgment of Court in an action against the Board. The law had been construed to permit recovery of any excess in paid freight charges after such a retroactive declaration that the approved rate was unreasonable. The state's highest court overruled its prior decision but followed that decision to the extent of permitting the shipper to recover excess in paid freight charges after the commission had retroactively declared the approved rate unreasonable; and this was held by the Supreme Court of the United States not to deprive the railroad of due process. In other words, the right of restitution read into the statute by the former decision of the court was held applicable as to all further transactions until the overruling of the prior decision.

The statement quoted by Appellee (p. 5) from 11 *Ohio Jur.*, Courts, § 140, p. 790 must yield to the equal protection clause of the Fourteenth Amendment.

No question of discrimination was involved in *City of Sidney v. Cummins*, 93 O. S. 328.

Backus v. Fort Street Union Depot Company, 169 U. S. 557, did not concern the application of different constructions of the same law to different litigants in the same situation although the Court (See quotation in our Jurisdictional Statement, p. 9) recognized that an act giving one individual certain rights and denying another similarly situated the same rights might be challenged on the ground of unjust discrimination and denial of the equal protection of the laws. Appellee's quotation (p. 6) from the *Backus* case does not relate to different litigants asserting the same rights based on the same facts arising at the same time, as here. The Court in the *Backus* case, 169 U. S. 557, at page 571, went on to point out that the case there under consideration arose under different law from the cases cited for the respondents.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 680, 50 S. Ct. 451, 454, the Court did say that the *mere* fact that a state court has rendered an erroneous decision on a question of state law or has overruled principles or doctrines established by previous decisions on which a party relied does not give rise to a claim under the Fourteenth Amendment but it then went on to hold that the decision of the state court in that case deprived appellant of its property without due process of law. So here, there is more than the *mere* overruling of principles or doctrines established by previous decisions—the same statute was construed to deny Appellants here the right given by the same Court's construction in the *Wrenn* cases to other Ohio corporations, to exclude from the tax base for the same years the United States bonds held by them.

In *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 44 S. Ct. 197, it was not claimed that any statute of the state was repugnant to the Constitution. This Court there held that

a judgment of the state court reversing its former decision to the prejudice of one party did not take away his property without due process and that Art. I, Sec. 10 of the Constitution protects the obligation of contracts against impairment by state statute only—not by judgments of state courts.

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54 did not involve inconsistent holdings relating to the same years.

Lombard v. West Chicago Park Com., 181 U. S. 33, merely held that no Federal question was involved in the assessment against property owners of part of the cost of an improvement in proportion to benefits under an enabling act enacted after a prior assessment had been held illegal and where the state court held it was competent on the new assessment to determine the question of benefits from the proof even though a different result was reached from that arrived at when the former illegal assessment was made.

It is again respectfully submitted that the Supreme Court has jurisdiction of and ought to consider these appeals upon their merits and reverse the judgments of the Supreme Court of Ohio.

Respectfully submitted,

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